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In the Supreme Court of the United States

OCTOBER TERM, 1978

ELIZABETH ANN NORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31a-48a) is reported at 581 F. 2d 390. The opinion of the district court (Pet. App. 4a-30a) is reported at 427 F. Supp. 138.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1978. A petition for rehearing was denied on August 18, 1978 (Pet. App. 49a). The petition for a writ of certiorari was filed on September 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States can assert the good faith and reasonable belief of its employees in the legality of their conduct as a defense in a suit under the Federal Tort Claims Act.

STATEMENT

1. On March 15, 1975, the Alexandria, Virginia, Police Department received a report from an anonymous caller that Patricia Hearst and another person were occupying an apartment in the Alexandria area. Federal warrants for Hearst's arrest were outstanding. The Alexandria police relayed this information to the local field office of the Federal Bureau of Investigation. A team of FBI agents and police officers were dispatched to the reported address. The agents and officers surveyed the apartment building and surrounding area and then decided to attempt to gain access to what proved to be petitioner's apartment (Pet. App. 6a-8a, 32a).[1]

Petitioner responded to a knock at her apartment door by asking: "Who's there?" She was told that it was the FBI. Petitioner requested identification. The FBI agents could not, however, exhibit their identification until petitioner opened her door. Unable to persuade her to open the door, the agents began to force it. Petitioner then unlatched the lock, and the law enforcement officers entered with weapons drawn.[2] A search of the apartment revealed no trace of Hearst or any of her suspected companions. Petitioner was advised that an anonymous call had prompted the visit to her apartment. The agents and detectives then left (Pet. App. 9a, 32a-33a).

2. Petitioner brought suit against the FBI agents, the police officers and the United States, seeking monetary and declaratory relief for the alleged invasion of her Fourth Amendment rights and for common law torts of

[1]Although the FBI agents possessed copies of warrants for Hearst's arrest, they did not seek a search warrant for the premises in question.

[2]Weapons were drawn because the fugitives sought by the FBI "had demonstrated a capacity for both violence and elusive flight" (Pet. App. 10a n.2).

assault, trespass and false imprisonment. The action against the federal agents was brought under the Fourth Amendment. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The United States was sued under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*

Based on a statement of stipulated facts, petitioner moved for partial summary judgment against the United States on the question of liability. The United States and the individual defendants cross-moved for summary judgment. The district court denied the defendants' motions but granted petitioner's motion. The court held that entry into petitioner's apartment violated her rights under the Fourth Amendment and also established "a prima facie case of assault, trespass and false imprisonment under Virginia law" (Pet. App. 13a-14a).

The district court concluded that the individual defendants would not be liable for either constitutional or common law torts "if they acted under a reasonable good faith belief in the legality of their actions" (Pet. App. 14a). A contrary result was reached with respect to petitioner's claim against the United States. The district court ruled that the United States could not, as a matter of law, assert the good faith and reasonable belief defense available to its agents (Pet. App. 16a-26a). Petitioner then dismissed her claims against the individual defendants and continued the case solely against the United States. After a hearing on the question of damages, the district court entered a final judgment awarding petitioner $12,500 (Pet. App. 34a).

The court of appeals reversed and remanded for further proceedings to determine whether the agents acted in good faith with a reasonable belief in the legality of their actions. It concluded that Congress had intended the liability of the United States under the FTCA to be "coterminus with the liability of its agents under *Bivens*"

(Pet. App. 35a). Because, under *Bivens* and its progeny, agents of the United States could raise "good faith" and related defenses, the court of appeals concluded that the same defenses are available to the United States (Pet. App. 40a-44a).[3]

ARGUMENT

1. The decision in this case is one of first impression. There is, accordingly, no conflict among the circuits on the question presented by the petition. Although the question is of some importance, and may eventually require resolution by this Court if a conflict should arise, there is no need for this Court to review the first decision that has considered the matter.

Moreover, the decision of the court of appeals did not dispose of all of the open questions. The case has been remanded to the district court for proceedings to resolve the question whether the FBI agents acted in good faith, with a reasonable belief in the legality of their procedures. If the lower courts should conclude that the agents did not act in good faith, then the question whether the United States is liable for damages caused by agents who are not themselves liable would have no further importance in this case. In other words, the petition for a writ of certiorari is premature. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. R.*, 389 U.S. 327 (1967).

2. At all events, the decision of the court of appeals is correct. In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that a violation of the Fourth Amendment by government agents gives rise to a cause of action for

[3]Judge Butzner dissented, stating that he agreed with the reasoning of the district court (Pet. App. 45a).

damages. This Court did not decide, however, the circumstances under which the defendant agents would be immune from liability, or what defenses could be asserted, and it remanded the case to the court of appeals for consideration of those questions. *Id.* at 397-398. On remand the Second Circuit, following *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967), held that federal agents could avoid liability by proving that they had acted in good faith and with a reasonable belief in the legality of their conduct. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F. 2d 1339 (2d Cir. 1972). The court explained that:

> At common law the police officer always had available to him the defense of good faith and probable cause, and this has been consistently read as meaning good faith and "reasonable belief" in the validity of the arrest or search.

Id. at 1347.[4]

Although *Bivens* and its progeny established liability standards for damages actions against federal law enforcement agents, no comparable remedies were available against the United States for the acts of those agents. See *Butz* v. *Economou*, No. 76-709 (June 29, 1978), slip op. 25-26. The Federal Tort Claims Act explicitly excepted from its coverage any claim arising from those torts (assault, battery, false imprisonment, or false arrest) most likely to be involved in a violation of the Fourth Amendment. 28 U.S.C. (1970 ed.) 2680(h). In order to allow suit against the United States in these cir-

[4]This formulation of the defense available to federal law enforcement officials has been generally followed. *E.g.*, *Burgwin* v. *Mattson*, 522 F. 2d 1213 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *Tritsis* v. *Backer*, 501 F. 2d 1021 (7th Cir. 1974); *Jones* v. *Perrigan*, 459 F. 2d 81 (6th Cir. 1972). See also *Butz* v. *Economou*, No. 76-709 (June 29, 1978).

cumstances, Congress amended the Act in 1974, making the United States directly liable for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" resulting from the acts of federal investigative and law enforcement agents. See 28 U.S.C. (Supp. V) 2680(h).

As the courts below recognized (Pet. App. 18a-19a, 44a), the Act subjects the United States to liability under the doctrine of respondeat superior. See *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972). It is generally established under that doctrine that the employer's vicarious liability for injuries inflicted by his servant is derivative; if the servant is not personally liable, neither is the employer. See, *e.g.*, *Simpson* v. *Townsley*, 283 F. 2d 743, 746-747 (10th Cir. 1960); see also *Restatement (Second) of Agency* §219 (1958). If "no liability can attach to the Government agents for the acts complained of, none can attach to the United States * * *." *Brooks* v. *United States*, 152 F. Supp. 535, 537 (S.D. N.Y. 1959); see also *Downs* v. *United States*, 522 F. 2d 990, 1003 (6th Cir. 1975); *National Manufacturing Co.* v. *United States*, 210 F. 2d 263, 278 (8th Cir.), cert. denied, 347 U.S. 967 (1954).[5]

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[5]The *Restatement (Second) of Agency*, *supra*, §219, at 484, explains that "[i]n any action against the master [based on the alleged tortious conduct of his servant], the latter has all the defenses open to one defending an action of tort, including contributory negligence, the personal immunity which he has, or a privilege which he or the servant has."

The common law sometimes treated the defenses of immunity and privilege differently, allowing the master to assert the privilege but not the immunity of the servant. *Id.* at §217. But this distinction, if applicable in suits under the Act, does not assist petitioner. Although often referred to as a "qualified immunity," the good faith and reasonable belief defense available to police officers was considered at common law to be a privilege, not an immunity. See, *e.g.*, *Restatement (Second) of Torts* §121, at 204-208; §204 at 381-384 (1965); 1 F. Harper & F. James, Jr., *The Law of Torts* §1.19, at 54-56; §3.18, at 277 (1956). See *Imbler* v. *Pachtman*, 424 U.S. 409, 419 n.13 (1976); *Procunier* v. *Navarette*, 434 U.S. 555 (1978) (plaintiff must plead and prove lack of good faith).

Petitioner argues (Pet. 5-8), however, that in suits based on the Fourth Amendment the United States can be held liable in circumstances where its agents have acted reasonably and in good faith. Neither the language of the 1974 amendment nor its legislative history supports such a construction of the statute. The 1974 amendment does not create strict liability. It simply applies the familiar principle of respondeat superior to certain torts previously excluded from the Act. Had Congress intended to create governmental liability in cases where federal agents are not liable, it surely would have said so expressly.[6] Moreover, the legislative history of the 1974 amendments confirms that Congress did not intend to permit judgments against the United States in such circumstances. The question before Congress in 1974—whether "the Federal Government should be held liable for the tortious acts of its law enforcement officers when they act in bad faith or without legal justification"—reflected a concern that *Bivens* suits against federal agents would prove to be "a rather hollow remedy" because "Federal agents are usually judgment proof." S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973).[7] Although the

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[6]In other contexts, this Court has declined to infer a congressional intent to create strict liability under the Act against the United States. See Laird v. *Nelms*, *supra*, 406 U.S. at 799-803; *Dalehite* v. *United States*, 346 U.S. 15, 45 (1953).

[7]The legislative history of the 1974 amendment is not extensive and appears principally in the Senate Report. The absence of extended discussion regarding the amendment strongly supports the view that Congress did not believe that it was fundamentally altering the nature of the United States' liability.

amendment waived the immunity of the United States for certain torts of law enforcement officers, Congress stressed that the new provision:

> [S]hould be viewed as a counterpart to the *Bivens* case and its progenty [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens (and for which that case imposed liability upon the individual Government officials involved).*

S. Rep. No. 93-588, *supra*, at 3 (emphasis added). By making the United States liable only where liability would extend to the government officials involved, Congress ratified the established principles of respondeat superior long applied under the Act.[8]

3. Petitioner's argument to the contrary (Pet. 7-10) is based principally on a general statement by Senator Percy that damage remedies against federal agents are "limited by the ease with which the agents can usually establish the defense of having acted in good faith and with probable cause." S. Rep. No. 93-469, 93d Cong., 1st Sess. 36 (1973). But Senator Percy made it clear that he was merely proposing "to amend the Federal Tort Claims Act so that victims of deliberate violence and terrorism at the hands of federal agents can be better compensated * * * for their losses." *Ibid.*; see also *id.* at 33 and 37. Moreover, Senator Percy's comments are not part of the legislative history of the 1974 amendment. The quoted statements

[8]As the court of appeals noted, Congress passed the 1974 amendment in the wake of certain drug raids that involved "outrageous" behavior by law enforcement officers. It was "intentional and abusive" conduct on the part of law enforcement officers about which Congress was concerned in creating a new remedy, not reasonable and good faith conduct (Pet. App. 42a).

are contained in an attachment to an earlier Senate Report involving the proposed reorganization of various federal drug enforcement units, and they are Senator Percy's "individual views." *Id.* at 1, 29. When the bill to amend the Federal Tort Claims Act was later considered by Congress, the purported ease with which federal agents could escape liability through the good faith and reasonable belief defense was not mentioned.[9] Instead, Congress focused on the need to provide innocent victims of intentionally abusive conduct with a viable remedy for damages. As the court of appeals recognized (Pet. App. 41a-42a), the existence of a good faith and reasonable belief defense is entirely consistent with that goal.

Petitioner also relies (Pet. 8) on a memorandum prepared by the staff of the Senate Government Operations Committee. But, as the court of appeals emphasized (Pet. App. 42a-43a n.11), that staff memorandum never became a part of the legislative record; it was not mentioned during the consideration of the 1974 amendment. There is no indication that it represents the view, or was even considered, by a single Senator or Representative. In such circumstances, it was proper to rely on the Senate Report rather than the staff memorandum in interpreting the Act.

As the court of appeals observed (Pet. App. 44a), the "imposition of liability without regard to the individual officer's defenses of good faith and reasonable belief would be a substantial enough departure from general principles of respondeat superior and would impose a potentially burdensome enough impact on the federal treasury that it should be supported by a clear expression

[9]Petitioner argues (Pet. 9) that the court of appeals did not follow Senator Percy's views, and instead looked "only to the official Senate Report on the matter * * *." But, as this Court has cautioned, the personal views of a single legislator—even the sponsor of a bill—are not a substitute for the views of Congress. See *Chandler* v.

of legislative intent * * *." Petitioner has demonstrated no such legislative intent and has cited no judicial authority supporting her interpretation. Since "statutes which waive immunity of the United States are to be strictly construed in favor of the sovereign" (*McMahon* v. *United States*, 342 U.S. 25, 27 (1951)), the court of appeals properly rejected petitioner's interpretation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Roudebush, 425 U.S. 840, 858-860 n.36 (1976). That caveat is particularly important here, where Senator Percy's remarks did not appear in the debate on the amendments in question.

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